IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

JOHN FAKOURI, *Petitioner*,

v.

JOSE MACIEL CADAIS, ET AL., *Respondents*.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Fifth Circuit is printed at R. 233-247 and is reported at 147 F. 2d 667. Its opinion denying application for rehearing is printed at R. 257-263 and is reported at 149 F. 2d 321.

JURISDICTION, STATEMENT OF THE CASE, ETC.

The required statements with respect to jurisdiction, questions presented, and the facts of the case already appear in the foregoing petition and are therefore not repeated at this point.

Specifications of Error.

The Court below erred:

1. In holding that the thirteen copies of Brazilian public records were sufficiently authenticated and therefore properly received in evidence.

2. In affirming the judgment of the District Court.

Text of Rules 43 and 44.

The pertinent portions of Rules 43 and 44 of the Federal Rules of Civil Procedure, 308 U. S. 718-720, are as follows:

"Rule 43. Evidence.

"(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

* * *

"Rule 44. Proof of Official Record.

"(a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the

certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

"(b) PROOF OF LACK OF RECORD. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

"(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law."

ARGUMENT.

The reasons submitted in the petition are largely self-explanatory. There will be no repetition in this brief, which will be limited primarily to the annotations to which reference has already been made in the petition.

I. The four methods of proof authorized by Rule 44.

Rule 44 authorizes four different methods of proving official records by copies when the original is not itself conveniently available for introduction in evidence. For convenient reference those four methods are here listed in the order and in the exact words in which they are found in that Rule.

Rule 44 (a) provides that such a record may be evidenced—

(1) "by an official publication thereof, or"

(2) "by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody."

Rule 44 (c) further provides two other alternative methods—

(3) "by any method authorized by any applicable statute, or"

(4) "by the rules of evidence at common law."

II. Certificate re custody of the record a common requirement of the alternative methods so authorized.

The first and, when applicable, presumably the preferable method stated in the Rule, viz.—by an official publication, is in a class by itself in that by its very nature it does not involve certificates of any sort. But by the same token that method is not ordinarily adapted to the proof of records of individual or personal concern, such as the births, deaths, marriages, etc., here in issue, and the other three methods ordinarily require certificates of one kind or another.

And what is much more to the point in the present connection is that inclusion of a certificate as to the actual custody of the record—something which was conspicuously absent in the instant case—is as we will see a common and essential requirement with respect to all three alternative ways of proving foreign records.

Taking those methods up in the order in which they appear in Rule 44, the alternative provision of Rule 44 (a) expressly requires that the copy be

> "attested by the officer having the legal custody of the record, or by his deputy, **accompanied with a certificate that such officer has the custody.**"

Turning next to the provision of Rule 44 (c) permitting resort to "any method authorized by any applicable statute," we find that review of the statutes has been greatly facilitated by the Note included with respect to that Rule by this Court's Advisory Committee in its Report to this Court. In that Note the Committee gathered together and listed a total of 52 such statutes most of which related to authentication of Federal, state, or local records, and only one of which was of general application to foreign records. That one, however, was U. S. C., Title 28, Sec. 695e, enacted as Sec. 6 of the Act of June 20, 1936, 49 Stat. 1561, 1563. It expressly provided—

> "Sec. 6. A copy of any foreign document of record or on file in a public office of a foreign country, or political subdivision thereof, **certified by the lawful custodian of such document**, shall be admissible in evidence in any court of the United States when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, certifying that the copy of such foreign document **has been certified by the lawful custodian thereof.** Nothing contained in this section shall be deemed to alter, amend, or repeal section 907 of the Revised Statutes, as amended (U. S. C., title 28, sec. 689)."

The decision below based the acceptance of the present documents on a Louisiana statute rather than on the common law under which some or all of them might well have been inadmissible for more than one reason (cf. *Duncan* v. *United States*, 68 F. 2d 136, 140-142). It appears, however, that in the absence of some such statutory provision one way or the other, certification as to the legal custody of the originals of foreign records has likewise been repeatedly required at common law. *Schaffer* v. *Krestovnikow*, 88 N. J. Eq. 523, 524-525; *Talcott* v. *Delaware Insurance Co.*, 23 Fed. Cas. No. 13734, page 652; *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 601-602; *American Surety Co.* v. *Sandberg*, 244 Fed. 150, 154, 156-157.

III. Meaning of term "applicable statute" in Rule 44 (c).

Even in the absence of the practice adopted throughout these Rules of making express reference to *state* laws or statutes as such where that was the intent, as for example in Rules 17(b), 62(f), 64, 81(c), 81(e), it would naturally be presumed that a general reference to statutes in Federal rules promulgated by the highest Federal court for the regulation of procedure in all the Federal district courts would mean *Federal* statutes rather than *state* statutes. But there is little need in this instance to fall back on a presumption, for the Advisory Committee's comprehensive Note in submitting Rule 44 to this Court made it clear that the reference therein to any "applicable statute" was limited to "statutes of the United States." That Note began as follows—

> "This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those specifically provided for by **statutes of the United States. Such statutes are** not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule. Some **of those statutes** are: * * *"

and then continued to list the 52 different Federal statutes already referred to in the preceding section of this argument.

IV. Construction of Rules 43 and 44 by court below was erroneous.

The construction placed by the Court below on Rules 43 and 44 is directly contrary to the established principles of construction. These Rules have the effect of a statute and should be similarly construed. It is familiar law that general language, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment, and that specific terms

prevail over general terms which otherwise might be controlling. *United States* v. *Chase*, 135 U. S. 255, 260; *Ginsberg* v. *Popkin*, 285 U. S. 204, 208. To the extent therefore that the decision of the court below rested on the general provisions of Rule 43(a) it in any event was in direct violation of this cardinal rule of construction.

That is so, even if Rule 43(a) could under any circumstances be construed to cover in general terms the same ground as Rule 44. The real truth is that the court below committed a further initial error in so assuming. For a careful reading of the first sentence of Rule 44 shows that it merely picks up where Rule 43(a) leaves off. It is the *original record* which is or is not primarily admissible as evidence, and that question is properly determined under Rule 43(a) alone. But when that issue, if any, as to relevancy, materiality, etc., has been so determined, then the effect of Rule 43(a), which by its express terms relates to "Admissibility," has exhausted itself. Rule 44 then takes over, and provides how "An official record or an entry therein, when admissible for any purpose [as determined under Rule 43(a)]" may be more conveniently authenticated or evidenced by copies of one sort or another. The court below was thus doubly in error in dragging Rule 43(a) into this case at all.

Thus any support that the decision below was asserted to have in Rule 43(a) is completely eliminated, and as already brought out in the petition it is in that respect in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Grabina*, 119 F. 2d 863. And it has already been shown in the preceding section of this brief that the decision below is equally without support in Rule 44(c) which is limited to Federal statutes, and hence does not permit recourse to a state statute

to support the evidencing of a foreign public document without a certificate as to its official custody.

Respectfully submitted,

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